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IN RE KANG CHONG YEOW, EX P MIVAN FAR EAST SDN BHD

HIGH COURT MALAYA, KUALA LUMPUR
ABDUL WAHAB PATAIL J
[BANKRUPTCY NO: 29-1208-98]
b 1 MARCH 2001

BANKRUPTCY: *Act of bankruptcy - Application to set aside bankruptcy notice and adjudicating and receiving orders - Failure to satisfy judgment debt - Absence of counter claim, set-off or cross demand equalling or exceeding* c *amount of judgment debt - Whether bankruptcy notice and adjudicating and receiving orders properly issued - Bankruptcy Act 1967 (revised 1988), s. 3(1)(i) - Bankruptcy Rules 1969 rr. 18, 40(b), 41, 215*

BANKRUPTCY: *Notice - Bankruptcy Notice - Application to strike out - Affidavit - Affidavit did not contain certificate by Commissioner for Oaths -* d *Whether fatally flawed - Affidavit in opposition not made by motion supported by an affidavit - Whether equally flawed - Bankruptcy Rules 1969, rr. 18, 40(b), 41*

BANKRUPTCY: *Notice - Bankruptcy Notice - Application to strike out -* e *Bankruptcy notice not filed in state of domicile - Whether irregular - Whether causing undue hardship on judgment debtor - Whether notice to be set aside - Discretion of court - Bankruptcy Act 1967 (revised 1988), s. 3(1)(i) - Practice Direction No 3/1993*

BANKRUPTCY: *Judgment - Judgment debt - Judgment debt quantified in* f *foreign currency - Whether irregular - Whether per se defective - Whether bankruptcy notice thereof bad in law*

Mivan Far East Sdn Bhd, the respondent and judgment creditor herein, had obtained a judgment against the appellant for USD51,450.16. Having had the g judgment, the respondent, through its chief executive officer ('James Laughlin'), commenced bankruptcy proceedings against the appellant. In consequence, a bankruptcy notice, and subsequently, upon the filing by the respondent of the creditor's petition supported by an affidavit verifying the statement, a receiving and adjudicating order, were issued by the learned senior assistant registrar ('SAR') against the appellant.
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The appellant opposed the proceedings and had filed an affidavit in opposition as well as the notice to oppose the petition. However, these applications, together with the appellant's other applications *inter alia* for stay of proceedings and for the setting aside of the receiving and adjudicating order, i had been dismissed by the learned SAR.

The appellant appealed to the judge in chambers and argued that: (i) the bankruptcy proceedings herein had contravened r. 215 of the Bankruptcy Rules 1969 ('the Rules') since James Laughlin was not authorised by the respondent under seal to commence the proceedings; (ii) the bankruptcy notice was flawed since the judgment debt was quoted in foreign currency; (iii) the bankruptcy notice was equally flawed as James Laughlin's affidavits contained no certificate by the commissioner for oaths testifying that the deponent had seemed to perfectly understand the depositions as required by r. 40(b) of the Rules; (iv) the bankruptcy notice had contravened Practice Direction No 3 of 1993 since it was filed in Kuala Lumpur and not in the appellant's state of domicile, Selangor; (v) he had a counter claim against the respondent which exceeded the value of the judgment debt; (vi) he was a shareholder in Mivan Far East Sdn Bhd and since the company had made a profit of RM4 million for the year 1997, he was by reason thereof able to pay the judgment debt; (vii) the judgment had been appealed against and was not a final judgment; and (viii) the affidavit verifying the petition, which was filed on 22 September 1998, was premature since the creditor's petition was only filed on 23 September 1998.

Before the learned judge, questions *inter alia* arose as to whether: (i) the bankruptcy notice was fatally flawed, bad in law and ought to be set aside; (ii) the appellant's affidavit in opposition and his other applications had complied with r. 18 of the Rules, and if not whether such non-compliance was fatal to the appellant's appeal; (iii) the appellant was able to pay the judgment debt within the meaning of s. 3(1)(i) of the Bankruptcy Act 1967 ('the Act'); and (iv) bearing in mind r. 215 of the Rules, James Laughlin could lawfully represent the respondent in the bankruptcy proceedings herein.

Held

[1] Until a judgment order has been stayed, the judgment creditor is entitled to proceed with execution. It is trite law that an appeal does not operate as a stay of execution. (p 244 e)

[2] The Rules does not bar the use of an affidavit that does not contain the required certificate mentioned in r. 40(b). In addition r. 41 of the Bankruptcy Rules gives discretion to the court to allow the use of an affidavit notwithstanding any defect. (pp 235 f & 236 h)

[2a] The nature, detail and consistency of James Laughlin's affidavits showed that he perfectly understood what he had deposed to therein. Given the fact that he had made affidavits in this matter not once but many times, and in the case for example of the creditor's petition and affidavit verifying statements in the creditor's petition, the documents as filed

included English translations, and that although he is 'illiterate' in Bahasa Malaysia he is not absolutely illiterate, it would in all circumstances be unreasonable to believe that he is incapable of understanding and did not understand perfectly what he deposed to. The objection in this respect must therefore fail. (p 236 e-g)

[2b] The appellant is duty bound to make a timely objection to bar the use of the affidavits herein. The fact that the objection was taken only at the appeal stage must bar the appellant from raising the same. (p 239 a-c)

[3] Rule 215 stipulates three ways by which a corporation may present a petition or take any other action under the Act. Clearly, it is only when the petition is presented by an officer of the corporation acting in his own name that such an officer must state that he is duly authorised under seal. (p 240 e-f)

[3a] The bankruptcy proceedings was taken by the respondent company Mivan Far East Sdn Bhd. The affidavits of James Laughlin clearly stated that he had been authorised to make the affidavits on behalf of the respondent and there was nothing to show that he was acting by himself. The objection under r. 215 is unsustainable on the facts. (p 240 g-h)

[4] Practice Direction No 3 of 1993 was issued for administrative convenience and efficiency and not to shield debtors from bankruptcy notices, such that bankruptcy notices not filed in accordance therewith must be set aside. In this respect, the court has the discretion whether or not to require the petitioner to file the bankruptcy notice in the state where the debtor is domiciled. (p 242 b-d)

[4a] The appellant's Petaling Jaya address was not much different in terms of distance from the Kuala Lumpur Court and the Shah Alam Court. No greater hardship was caused to the judgment debtor merely because the bankruptcy notice was filed in Kuala Lumpur rather than Shah Alam. Thus, even if the judgment debtor now had his residence in the said Petaling Jaya address, there was no inconvenience caused on him to appear in Kuala Lumpur. This court would therefore reject his objection in this respect. (p 242 e)

[5] The bankruptcy notice had not only stated the original sum due in US dollars, but had also stated the conversion rate applied, being RM3.62 = US1.00. In the circumstances, there is no dispute in this case as to the sum in the original currency in the judgment. (p 243 a)

[6] The submission on the appellant's ability to pay has no merit. The respondent company and the appellant debtor are entirely separate entities such that the profits of the company are not necessarily the profits in the hands of the appellant in proportion to his shareholding. Dividends must first be declared. Until the dividends are in hands, and in the absence of any evidence as to any other assets that may be used to make payment, the appellant was clearly a person who is unable to pay. (p 243 h)

[7] Petitions come into being upon execution by the petitioner and not upon filing. The creditor's petition here was executed on 22 September 1998, being the same day that the verifying affidavit was filed. The affirmation was therefore not defective in any way. (p 244 g)

[8] The affidavit in opposition did not fulfil the requirements of s. 3(1)(i) of the Act on the setting aside of a bankruptcy notice. What was filed by the appellant was an affidavit in opposition that left the amounts unquantified, thereby providing no basis upon which this court could be satisfied that the appellant had a counter claim, set off or cross demands equalling or exceeding the amount of the judgment debt. Although reference was made to an undertaking for damages in respect of an injunction that was obtained by the respondent, the affidavit in opposition did not depose to any circumstances that would provide a basis to believe that there would be substantial damages as would equal or exceed the amount of the judgment debt. (p 245 d-f)

[9] Failure to follow r. 18 which requires an application to be made by motion supported by affidavit would render an affidavit in opposition ineffective and bad in law. In this case, both the affidavit in opposition and the application to set aside the order for substituted service made on 5 November 1998 and to stay all proceedings against the appellant did not comply with rule 18 and could not be used to oppose the creditor's petition. (p 246 c-f)

[Appeals dismissed.]

Case(s) referred to:

Ascot International Pte Ltd v. Elevic Trading Sdn Bhd [1996] 2 CLJ 645 ***(refd)***
Ban Hin Lee Bank Bhd v. Pang Lai Hin [1999] 4 CLJ Supp 385 ***(dist)***
Datuk Lim Kheng Kim v. Malayan Banking Bhd [1993] 4 BLJ 28 ***(foll)***
Development & Commercial Bank Bhd v. Datuk Ong Kian Seng [1995] 3 CLJ 307 ***(foll)***
Low Mun v. Chung Khiaw Bank Ltd [1987] 2 CLJ 400; [1987] CLJ (Rep) 172 ***(refd)***
Overseas Chinese Banking Corporation Ltd v. Firm of Yaik Joo Ann [1936] MLJ Rep 88 ***(refd)***

Perwira Habib Bank Malaysia Bhd v. Samuel Pakianathan Jabamanickam [1993] 3 CLJ 349 ***(refd)***
Ratna Ammal v. Tan Chow Soo [1971] 1 MLJ 277 ***(refd)***
Ratnam v. Cumaraswamy & Anor [1965] 31 MLJ 228 ***(cit)***
Re Chew Chee Sun, ex p Chan Theam Soon [2000] 4 CLJ 144 ***(cit)***
S Ravi G Suppiah v. Timbalan Menteri Hal Ehwal Dalam Negeri [1995] 2 CLJ 152 ***(dist)***
UMBC v. Richland Trade & Development Sdn Bhd [2000] 1 CLJ 571 ***(foll)***

Legislation referred to:
Bankruptcy Act 1967, s. 3(1)(i)
Bankruptcy Rules 1969, rr. 18, 40(b), 41, 106, 108, 215, 274, 276
Rules of the High Court 1980, O. 2 rr. 1(1), 2(1), O. 14, O. 41 r. 3, O. 54 r. 1(3A), O. 56 r. 1(3A)

For the judgment debtor - Saran Singh; M/s Saran Singh & Co
For the judgment creditor - Yougesswary Singam; M/s Zainal Abidin & Co

Reported by WA Sharif

JUDGMENT

Abdul Wahab Patail J:

The Appeals

These appeals to the judge in chambers are contained in encls. 23, 44 and 64, and may be summarised as follows:

1) **Enclosure 23** filed on 19 September 1998 by the appellant/judgment debtor Kang Chong Yeow, (hereinafter referred to as appellant) against the decision of the senior assistant registrar made on 17 September 1998 that:

   a) Afidavit menentang notis bankrapsi (kand. 4) filed on 27 May 1998;

   b) Saman dalam kamar bertarikh 22 June 1998 (kand. 7) (further proceedings be stayed pending hearing of an Appeal in respect of the judgment in the Court of Appeal);

   c) Saman dalam kamar bertarikh 21 June 1998 (kand. 16)(setting aside bankruptcy notice);

   ditolak dengan kos.

2) **Enclosure 44** filed on 24 December 1998 by the appellant as debtor against the decision of the senior assistant registrar on 21 December 1998 ordering:

a) Saman dalam kamar bertarikh 2 Disember 1998 (kand. 34) ditolak dengan kos

b) Notis oleh penghutang penghakiman niat untuk menentang petisyen bertarikh 2hb. Disember 1998 (kand. 32) ditolak;

c) Petisyen bertarikh 23hb. September 1998 (kand. 25) dibenarkan dan Perintah Penghukuman dan Perintah Penerimaan dibenarkan.

3) **Enclosure 64** filed on 18 September 1999 by the appellant as debtor against the decision of the senior assistant registrar on 7 October 1999 ordering that the summons in chambers dated 4 January 1999 (encl. 46) be dismissed with cost. Enclosure 46 had applied for orders that:

a) All further proceedings be stayed until hearing of appeals in the proceedings to Judge in Chambers.

b) The adjudication and receiving orders of 21 December 1998 be set aside on the ground of being a nullity.

c) All further proceedings be stayed until hearing of this application.

All of these appeals were filed by T/n Saran Singh & Co for the appellant. Submissions on these appeals were heard together on 14 March 2000.

The Brief Background

The bankruptcy notice was applied for by Mivan Far East Sdn Bhd as judgment creditor (hereinafter referred to as the respondent) on 30 April 1998; and was issued and registered as Bankruptcy Notice No. 1208 of 1988 on 30 April 1998 (encl. 4) upon the basis of a judgment debt for US$51,450.16, interest thereon at the rate of 8% p.a. from 30 December 1994, and costs RM350 made on 21 June 1996 in the High Court in Malaya in Kuala Lumpur (Commercial Division) Guaman D1-22-1066-1994. The bankruptcy notice was given the number D3-29-1208-1998 in the High Court in Malaya in Kuala Lumpur.

The bankruptcy notice was served personally upon the appellant at 3.48pm outside the Mahkamah Sesyen 1, Georgetown, Pulau Pinang, on 21 May 1998.

Section 3(1)(i) of the Bankruptcy Act gives the debtor seven days from the date of service within which to take steps. The appellant filed his affidavit in opposition on 27 May 1998 (encl. 4). The grounds in the affidavit in opposition (encl. 4) are as follows:

> Saya, KANG CHONG YEOW (NO. K.P. 2192826) seorang warganegara Malaysia yang cukup umur dan beralamat di No. 22, Jalan PJS 5/8 Taman Desa Ria, Petaling Jaya, dengan ini berikrar dan mengatakan seperti berikut:

1. Pada 21hb. Mei 1998, saya telah diserahkan dengan Notis Bankrapsi dalam premis Mahkamah Sesyen di Pulau Pinang. Saya mengatakan servis "tersebut tidak sah dan tidak mengikut peraturan.

2. Semenjak bulan Julai 1997, saya telah tinggal dan bermastautin di alamat No. 22, Jalan PJS 5/8, Taman Desa Ria, Petaling Jaya, dengan isteri baru saya.

3. Mahkamah tidak memberi Penghakiman dalam matawang Malaysia Pemiutang Penghakiman tidak boleh meneruskan prosiding ini atas Penghakiman matawang asing.

4. Saya menafikan bahawa kadar tukaran matawang asing adalah US$1.00 = RM3.62.

5. Saya mempunyai Tuntutan Balas dan tolakan terhadap Pemiutang Penghakiman yang melebihi daripada Penghakiman tersebut:

   a) Penghakiman tersebut bukanlah satu Penghakiman yang 'final Judgment'. Terdapat Rayuan terhadap Penghakiman tersebut di Mahkamah Rayuan Sivil No. W-03-105-96 yang masih belum dibicarakan;

   b) Dalam tindakan Mahkamah Tinggi Kuala Lumpur Guaman No.: Dl-22-1066-94, Mahkamah hanya membenarkan sebahagian tuntutan Pemiutang Penghakiman dan tolak baki tuntutan dengan kos Selepas itu, Pemiutang Penghakiman sendiri telah merayu ke Mahkamah Rayuan terhadap keputusan tersebut. Rayuan tersebut melainkan Mahkamah Rayuan Sivil No. W-03-106-96 masih belum dibicarakan Tetapi sebelum Rayuan tersebut boleh dibicarakan maka Pemiutang Penghakiman telah mencuba menarik balik rayuan tersebut oleh kerana Rayuan tersebut tidak mempunyai merit . Saya kepilkan salinan Notis Pemberhentian yang disediakan oleh peguam Pemiutang Penghakiman ditandakan sebagai. Ekshibit "K-1" Kos yang patut dibayar oleh Pemiutang Penghakiman adalah lebih kurang RM50,000.00 oleh kerana lebih daripada 20 kes/authoriti telah dikemukakan dalam perbicaraan.

6. a) Pemiutang Penghakiman juga telah memulakan tindakan Mahkamah Tinggi Shah Alam Guaman No. 22-238-95 terhadap saya. Saya kepilkan salinan Writ Saman yang ditandakan sebagai Ekshibit "K-2";

   b) Pemiutang Penghakiman juga telah mendapat Perintah injunksi bertarikh 6 hb. Julai 1995 terhadap saya atas akujanji bahawa mereka akan bayar gantirugi jika akhirnya injunksi tersebut diketepikan/ batalkan. Saya kepilkan salinan Perintah tersebut yang ditandakan sebagai Ekshibit "K-i";

c) Tetapi pada 11hb. Julai 1996, keseluruhan tuntutan Pemiutang Penghakiman telah dibatalkan oleh Penolong Kanan Pendaftar selepas mendengar hujah-hujah semua pihak. Saya kepilkan salinan Perintah yang ditandakan sebagai Ekshibit K-4;

d) Pemiutang Penghakiman telah merayu terhadap keputusan tersebut tetapi Hakim telah menolak Rayuan tersebut dengan kos. Dengan itu, injunksi juga dibatalkan;

e) Oleh demikian, saya berhak untuk menuntut gantirugi atas akujanji tersebut dan juga kos. Gantirugi yang dihadapi oleh saya oleh kerana injunksi tersebut adalah tidak kurang dari RM10 juta. Selanjutnya saya juga berhak untuk kos sebanyak 1,114,250,000.00 oleh kerana tuntutan Pemiutang Penghakiman adalah complex dan mempunyai keraguan dan adalah untuk mengugut saya;

f) Mahkamah Tinggi Shah Alam masih dalam proses mentaksirkan gantirugi dan kos yang patut dibayar oleh Pemiutang Penghakiman.

7. Saya mengatakan bahawa semua tuntutan tersebut tidak boleh dikemukakan dalam Penghakiman tersebut oleh kerana prosiding di Mahkamah Shah Alam masih berterusan.

8. Saya mengatakan bahawa saya tidak dapat tuntut-balas dalam tindakan dimana Penghakiman di perolehi oleh kerana kausa tindakan saya untuk gantirugi hanya bangkit apabila tindakan Shah Alam Mahkamah Tinggi 22-238-95 dibatalkan pada 11hb. Julai 1996.

9. Saya memohon Notis Bankrapsi diketepikan.

By notice dated 27 May 1998, the above was set down for hearing on 13 July 1998. The executive director of the respondent, James Martin Laughlin, filed an affidavit on 30 June 1998 (encl. 10) in reply to encl. 4 above.

On 22 June 1998 the appellant filed an application (encl. 7) to stay further proceedings until disposal of his appeal on the judgment to the Court of Appeal. The supporting affidavit (encl. 6) disclosed that the appellant had a) made an appeal to the Court of Appeal in a civil suit, b) filed a further civil suit against the respondent in the Shah Alam High Court Civil Suit 22-238-95, and c) had claims for damages of RM10 million against the respondent upon an undertaking for damages for a injunction that the latter had obtained. In respect of Guaman D1-22-1066-1994, the appellant deposed that the respondent had appealed but had withdrawn his appeal.

The other steps taken by the appellant may be discerned from the applications he made and in respect of which these appeals are pursued.

The Grounds Of Appeal

The submissions for the three appeals were consolidated and argued together, and are dealt with in the following order:

Rule 40(b) of the Bankruptcy Rules 1969

The respondent has admitted to a defect in the certificate of the commissioner of oaths. In the affidavit of Cila Nasu affirmed on 22 July 1998 (encl. 18) deposed at para. 5 that there was a mistake in the certificate, that **"Cila Nasu"** as underlined above should read James Martin Laughlin. This is not a major issue with the appellant. Even though the certificate is that of the commissioner of oaths, and the correction ought to have been made by him, and not by Cila Ak Nasu, I accept the correction by the latter since the error being corrected is plain and obvious in nature.

The main part of the appellant's argument is that the affidavit of James Martin Laughlin (encl. 10) is defective because the jurat does not state that deponent understands the contents of the affidavit.

Rule 40(b) of the Bankruptcy Rules 1969 provides:

> Where it appears to the person administering the oath that the deponent is illiterate or blind, he shall certify in the jurat that:
>
> (b) the deponent seemed perfectly to understand it.

In this case the certificate by the commissioner of oaths to the jurat stated only as follows:

> Berkenaan dengan afidavit deponen bernama James Martin Laughlin diikrarkan pada 30 haribulan Jun, 1998 di Kuala Lumpur melalui terjemahan oleh Cila ak Nasu, seorang Peguamcara dan Peguambela.
>
> Cila ak Nasu yang tersebut setelah mula-mula sekali bersumpah bahawa dia telah dengan sebenarnya dengan nyatanya dan dengan dapat didengar menterjemahkan isi kandungan afidavit ini kepada deponen James Martin Laughlin dan bahawa dia akan sebenarnya dan jujurnya menterjemahkan ikrar yang sedang hendak dikendalikan ke atas dirinya **Cila ak Nasu** tersebut itu.

The commissioner of oaths had therefore failed to certify that the deponent had seemed perfectly to understand it.

Even though it was held in *UMBC v. Richland Trade & Development Sdn Bhd* [2000] 1 CLJ 571 FC, that the governing provisions in bankruptcy proceedings are the provisions of the Bankruptcy Rules, the Rules of the High Court may always be referred to for interpretation where provisions are similar, or resorted to upon questions where the Bankruptcy Rules are silent.

Order 41 r. 3 of the Rules of the High Court is similar to r. 40(b) of the Bankruptcy Rules 1969:

> 3 Affidavit by illiterate or blind person (O. 41 r. 3)
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> Where it appears to the person administering the oath that the deponent is illiterate or blind, he must certify in the jurat that:
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> (a) the affidavit was read in his presence to the deponent;
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> (b) the deponent seemed perfectly to understand it; and
>
> (c) the deponent made his signature or mark in his presence;
>
> and the affidavit shall not be used in evidence without such a certificate unless the Court is otherwise satisfied that it was read to and appeared to be perfectly understood by the deponent.

In *S Ravi G Suppiah v. Timbalan Menteri Hal Ehwal Dalam Negeri* [1995] 2 CLJ 152 the deponent made the affidavit in Bahasa Malaysia but signed in Tamil. There was nothing in the affidavit to indicate that the contents of the affidavit appeared to be perfectly understood by the deponent. It was held that the requirement of O. 41 r. 3 is mandatory and must be complied with. While the rules must *prima facie* be complied with (see *Ratnam v. Cumaraswamy & Anor* [1965] 31 MLJ 228 PC), it is equally trite that the rules must be applied according to its particular terms.

There is however an important difference between O. 41 r. 3 of the Rules of the High Court and r. 40(b) of the Bankruptcy Rules. Order 41 r. 3 provides that the affidavit shall not be used in evidence unless the court is otherwise satisfied that it was read to and appeared to be perfectly understood by the deponent. Rule 40(b) on the other hand only requires the person administering the oath to certify in the jurat that the deponent seemed perfectly to understand it. There is no provision that if such certificate by the person administering the oath is absent, the affidavit shall not be used in evidence. In other words, the Bankruptcy Rules leaves it to the discretion of the court as to whether to allow its use.

The record shows that the appellant filed an 'afidavit lanjutan' (encl. 11) in reply to encl. 10 by the respondent a week after the latter was filed. In it he a) objected that the judgment creditor was deliberately putting pressure on him by asserting various allegations that were not true, b) claimed the application for a notice of bankruptcy was invalid because James Martin Laughlin was not authorised to apply, c) complained about the service of the bankruptcy notice and other matters. But there was no complaint as to the above defects, be it the correction as to the name or the failure to state that the deponent

James Martin Laughlin did seem to Cila Ak Nasu to perfectly understand the affidavit. In a summons in chambers three weeks after encl. 10, an application was made only to set aside the bankruptcy notice.

A second affidavit by James Martin Laughlin was filed on 23 July 1998 with similar jurat. There was no certificate by the commissioner of oaths that James Martin Laughlin seemed perfectly to understand the affidavit. The objection in para. 3(b) of encl. 46 filed on 4 January 1999 therefore came well after various steps have been taken by both parties, including replies made by the appellant to the those affidavits. Other affidavits of James Martin Laughlin, before or after 4 January 1999 contained the same defect. Even though in encl. 48 para. 10 filed on 27 January 1999, James Martin Laughlin did depose:

> 10. Saya menafikan dengan keras alegasi bahawa saya tidak faham isi kandungan afidavit-afidavit yang saya telah mengikrarkan. Saya juga menyatakan di sini bahawa jurat yang dicatit dan diikut adalah teratur.

the affidavit contained the same defect in that there is no certificate as to whether the deponent seemed perfectly to understand it.

After reading all of the affidavits of the deponent James Martin Laughlin, I am satisfied from a) the fact the deponent is a person who is the executive director of a company, and b) the nature, detail and consistency of his affidavits shows that he perfectly understood what he deposed to in the affidavits, and the omission in the certificate of the commissioner of oaths to state that the deponent perfectly understood the interpretation by Cila Nasu was an omission by the commissioner of oaths and does not mean that the deponent did not understand perfectly what he deposed to. Given the fact he had made affidavits in this matter not once but many times, and in the case for example, of the creditor's petition (encl. 25) and affidavit verifying statements in the creditor's petition, the documents as filed included English translations; and that although he is "illiterate" in Bahasa Malaysia, he is not absolutely illiterate, it would in all the circumstances be unreasonable to believe that he is incapable of understanding and did not understand perfectly what he deposed to.

In addition, r. 41 of the Bankruptcy Rules 1969 gives discretion to the court to allow the use of an affidavit notwithstanding any defect. It provides as follows:

> 41. Formal defects.
>
> (1) The Court may allow an affidavit to be used in evidence notwithstanding any defect by misdescription of parties or otherwise in the title or jurat or any other irregularity in the form of the affidavit.

(2) A note that it has been so used in evidence shall be endorsed on the affidavit.

The Bankruptcy Rules does not bar the use of an affidavit that does not contain the required certificate. It would be unfair and unjust for the party in whose behalf the deponent made the affidavit to be penalised because of an error of the commissioner of oaths if he fails to certify. In the exercise of the discretion whether or not to allow a defective affidavit to be used, the same considerations as made above apply, and I would disallow the objection upon the affidavits of James Martin Laughlin.

To take the subject further, I have considered that even if it is accepted there is a *lacunae* in the Bankruptcy Rules 1969 with regard to how the discretion under r. 41 is to be exercised, and how and when an objection on grounds of such defect should be made, bearing in mind that if it is not made within a reasonable time the parties would have committed themselves to courses of action they may not have made if the objection is taken earlier, and which may result in a) large sections of the proceedings being set aside and b) the action, set down for hearing cannot be concluded, reference may be made first to r. 274:

274. Effect of non-compliance with Rules.

Non-compliance with any of these Rules or with any rule of practice for the time being in force shall not render any proceeding void unless the Court shall so direct but such proceeding may be set aside either wholly or in part as irregular or amended or otherwise dealt with in such manner and upon such terms as the Court may think fit.

In considering r. 274 collateral reference may also be made to r. 276 of the Bankruptcy Rules 1969 which provides how a *lacunae* may be dealt with:

276. Rules of the High Court applicable in event of *lacunae*.

In the absence of any rule regulating any proceeding under the Act or these Rules, the Rules of the High Court shall apply, *mutatis mutandis*.

The effect of non-compliance with the rules is provided for by O. 2 of the Rules of the High Court 1980:

1 Non-compliance with rules (O. 2 r. 1)

(1) Where, in beginning or purporting to begin any proceedings or at any stage in the course of or in connection with any proceedings, there has, by reason of any thing done or left undone, been a failure to comply with the requirements of these rules, whether in respect of time, place, manner, form or content or in any other respect, **the failure shall be treated as an irregularity and shall not nullify** the proceedings, any step taken in the proceedings, or any document, judgment or order therein.

(2) Subject to paragraph (3), the Court may, on the ground that there has been such a failure as is mentioned in paragraph (1), and **on such terms as to costs or otherwise as it thinks just**, set aside either wholly or in part the proceedings in which the failure occurred, any step taken in those proceedings or any document, judgment or order therein or exercise its powers under these rules to allow such amendments (if any) to be made and to make such order (if any) dealing with the proceedings generally as it thinks fit.

(3) The Court shall not wholly set aside any proceedings or the writ or other originating process by which they were begun on the ground that the proceedings were required by any of these rules to be begun by an originating process other than the one employed.

2 Application to set aside for irregularity (O. 2 r. 2)

(1) An application to set aside for irregularity any proceedings, any step taken in any proceedings or any document, judgment or order therein shall not be allowed unless it is made within, a reasonable time and before the party applying has taken any fresh step after becoming aware of the irregularity.

(2) An application under this rule may be made by summons or motion and the grounds of objection must be stated in the summons or notice of motion.

Order 2 r. 1(1) makes it clear that failure to comply with the requirements of these rules, whether in respect of time, place, manner, form or content or in any other respect should not nullify the proceedings. Order 2 r. 2(1) allows the partial setting aside and to make amendments to correct the irregularity. Order 2 r. 2 stresses that the irregularities would not nullify any proceeding, step in proceedings, document, judgment or order, by providing that even if such irregularities occurred, an application to set aside on grounds of irregularity shall not be allowed unless made within reasonable time and before the party applying had taken any fresh step.

Order 2 r. 2(1) of the Rules of the High Court was not applicable in *S Ravi G Suppiah v. Timbalan Menteri Hal Ehwal Dalam Negeri, Malaysia & Anor* for the reason that O. 41 r. 3 specifically provides not only that there must be a certificate that includes that the deponent seemed perfectly to understand it, but also that an affidavit with such a defect shall not be used unless the court was otherwise satisfied it was in fact read to and appeared to be perfectly understood by the deponent. The mandatory term in O. 41 r. 3 precludes the application of O. 2 r. 2(1).

When a document purporting to be an affidavit is filed in court, it is accepted by the registry and registered as an affidavit. That it might not be used in the proceedings because of a defect is another matter. A timely objection must be made by the other party to bar its use. It would be ridiculous to impose an inflexible rule that a defective affidavit must be treated as an illegality and not to be used, regardless of when an objection is made in that behalf. Such a rule makes it equally open to the party filing the affidavit, if taken to task for its contents, to resort to defects in it to say that it is not an affidavit and cannot be used. It would enable the unscrupulous to make such affidavits, to benefit from them if no objection is taken, and to escape the consequences if taken to task.

In the circumstances the fact that the objection is taken at such a late stage of the proceedings bars the appellant from raising the objection.

Rule 215 Bankruptcy Rules 1969

The second ground is that r. 215 of the Bankruptcy Rules 1969 provides that the officer must be duly **authorised under seal** to commence bankruptcy proceedings.

It was submitted that it not disputed by the parties that the action was commenced by the officer without authorisation under seal. That submission relied upon encl. 48 para 11 where James Martin Laughlin deposed for the respondent:

> 11. Saya menafikan bahawa prosiding ini memerlukan seal. Saya mengesahkan sekali lagi disini bahawa prosiding ini dimulakan dan diteruskan mengikut Artikel 95, perkara-perkara Persatuan Syarikat Mivan Far East Sdn. Bhd. Artikel 95 adalah seperti berikut:
>
> A resolution in writing signed by a majority of the Directors for the time being or their alternates not being less than two Directors shall be valid and effectual as if it had been passed by a meeting of Directors duly called and constituted. Any such resolution may consist of several documents in like form each signed by one or more directors.

The submission referred also to encl. 26 para. 1 producing a resolution dated 1 April 1998 (exh. JML-2) appointing James Martin Laughlin to represent the company in legal proceedings, including bankruptcy proceedings, against the judgment debtor. The resolution did not mention authorising James Martin Laughlin under seal as required by the above-mentioned rule. It was argued that in doing so the judgment creditor conceded that James Martin Laughlin did not have an appointment under seal.

The respondent had subsequently produced in a supporting affidavit (encl. 67) filed on 19 October 1999 a resolution under seal and dated 15 April 1998 and marked as exh. JML-1. It was submitted for the appellant that since it was filed on 19 October 1999, after the date of the hearing before the registrar it cannot be accepted. He relied on O. 56 r. 1(3A) of the Rules of the High court, that new evidence shall not be admitted unless the judge is satisfied that the fresh evidence was not available to the party seeking to use it or that reasonable diligence would not have made it available, in the hearing before the learned senior assistant registrar on 17 September 1998.

Rule 215 provides as follows:

> 215. Officer of corporation, etc.
>
> Where a corporation presents a petition or takes any other action under this Act, the officer of the corporation may act in his own name, stating that he is such officer duly authorised under seal, but a petition may be presented by the corporation, and signed by the officer on its behalf. Any person chosen by the corporation to act for it as agent, is an "officer" within section 133, and if duly authorised under seal can act for the corporation.

It is clear from the first part of r. 215 that where a corporation presents a petition or takes any other action under this Act, it may do so firstly by an officer of the corporation acting in his own name, in which case he has to state that he is such officer duly authorised under seal; and secondly a petition may also be presented by the corporation and signed by an officer of the corporation on its behalf. The next part of the rule applies to a third method of presenting a petition, that is by an agent, who is not an officer of the corporation in the ordinary course, but is deemed to be an officer for the purpose of presenting a petition; and since such agent is an independent entity outside the corporation he would need to be duly authorised under seal before he can present a petition for the corporation.

The proceeding in this case, however, is clearly taken under the second alternative, that is, by the company Mivan Far East Sdn Bhd. The affidavits deposed by James Martin Laughlin states clearly that he is the executive director of the judgment creditor (respondent) and that he has been authorised to make the affidavit on behalf of the respondent. Nothing in this proceeding shows that it is being undertaken by James Martin Laughlin himself on behalf of Mivan Far East Sdn Bhd. In the circumstances the objection under r. 215 is unsustainable on the facts. Since no authorisation under seal is necessary in this case, it is unnecessary to refer to exh. JML-1 in encl. 67 and therefore the objection under O. 54 r. 1(3A) of the Rules of the High Court 1980 does not arise.

Place Where Bankruptcy Notice Issued

A bankruptcy notice must be filed at a place where the debtor is domiciled for at least one year. It was submitted in the written submission at encl. 63 that encl. 4 para. 4 clearly states debtor domiciled and has his residence in Selangor since July 1997, but the bankruptcy notice filed on 30 April 1998 was filed in Kuala Lumpur. It was submitted that this filing of process in Kuala Lumpur is contrary to Practice Direction 3 of 1993, and that it ought to have been filed in the Shah Alam High Court. In encl. 45, the previous bankruptcy notice had a Petaling Jaya address. But the present bankruptcy notice was filed in Kuala Lumpur High Court.

The debtor's affidavit at encl. 4 was filed on 27 May 1998, and it stated at para. 2 that:

> Semenjak bulan Julai 1997 saya telah tinggal dan bermastautin di alamat No. 22, Jalan PJS 5/8, Taman Desa Ria, Petaling Jaya, dengan isteri baru saya.

The information that he was domiciled in Petaling Jaya came on record only on 27 May 1998, about four weeks after issue of the bankruptcy notice, and which was served on 21 May 1998 (see encl. 9). The debtor had in an "afidavit menentang notis bankrapsi" dated 18 June 1997 (see exh. JML-2 at encl. 10) deposed:

> 2. Saya mengatakan bahawa saya telah tinggal di Kuala Lumpur selama lebih kurang 5 tahun dengan isteri dan keluarga saya. Saya tidak pernah tinggal di Selangor Darul Ehsan. Alamat No. 22, Jalan PJS 5/8, Taman Desa Ria, Petaling Jaya, bukan alamat kediaman saya.

That earlier bankruptcy notice had been issued against the debtor at that Petaling Jaya address. The current bankruptcy notice was served upon the debtor outside Sessions Court 1, Penang after having failed to serve the same upon the debtor at his Petaling Jaya as well as his No. J22D, Jade Tower, O.G. Heights, 58 Jalan Awan Cina, 58200 Kuala Lumpur addresses.

It is appropriate to consider at this point the terms of the Practice Direction No 3 of 1993:

> (ii) Pendaftaran kes-kes kebankrapan
>
> Semua kes kebankrapan hendaklah difailkan di mahkamah di dalam negeri dimana siberhutang penghakiman bermastautin.
>
> Bagi kes-kes kebankrapan yang difailkan di mahkamah selain daripada mahkamah yang dinyatakan di atas, mahkamah yang berkenaan hendaklah menasihatkan pihak yang memohon (petitioner) untuk memfailkan kes-kes berkenaan di mahkamah dimana siberhutang penghakiman bermastautin.

> Bagi kes-kes yang telah didaftarkan sebelum Arahan Amalan ini berkuatkuasa, pihak yang memohon (petitioner) boleh membuat permohonan secara bertulis untuk memindahkan kes tersebut ke mahkamah di mana siberhutang penghakiman bermastautin. Semua surat permohonan hendaklah disalinkan kepada pihak pihak yang berkenaan.

The said Practice Direction was issued for administrative convenience and efficiency. The requirement that the notice be filed in the state where the debtor is domiciled is to assist to ensure that notices could be served effectively and quickly. The Practice Direction was not issued to shield debtors from bankruptcy notices, such that bankruptcy notices not filed in accordance therewith must be set aside. The second paragraph directs courts to advise petitioners in the state where the debtor is domiciled. It does not authorise the dismissal of or declare invalid any bankruptcy notice filed in a place other than where the debtor is resident. In such event, the court has the discretion, to be exercised judicially, whether to require the petitioner to file the bankruptcy notice in the state where the debtor is domiciled. It is noted that it was not disputed that the process server was unable to serve the bankruptcy notice upon the debtor at either address but had to serve the same upon the debtor in Penang. The Petaling Jaya address is not much different in terms of distance from the Kuala Lumpur Court and the Shah Alam Court. No greater hardship is caused upon the debtor merely because the bankruptcy notice is filed in Kuala Lumpur rather than in Shah Alam. Thus even if it is true the debtor now has his residence in the said Petaling Jaya address which he originally denied, there is no inconvenience caused upon the debtor to appear in Kuala Lumpur. In the circumstances I would reject the objection.

Bankruptcy Notice Defective

The next objection is that the judgment was in US currency only, and without any order as to the conversion rate to be applied, the bankruptcy notice was issued in Malaysia currency. Counsel relied upon *Ascot International Pte Ltd v. Elevic Trading Sdn Bhd* [1996] 2 CLJ 645. In that case the statement of claim claimed the sum due in Singapore currency, with no conversion rate mentioned. It did not render the action invalid, but instead it was one of the grounds for refusing an O. 14 application for summary judgment since there were issues to be tried:

> Relying upon Terrell J's decision I hold that the writ filed in the Malaysian Court by the plaintiffs on 13 October 1994 should have shown the conversion of the Singapore Dollars with the equivalent value in Malaysian currency before filing the writ in Court; to crystallise the liability of the defendants in local currency; in the face of the continuous exchange loss to the defendant by the fluctuating foreign currency market. Purely on this ground, the O. 14 application for summary judgment must be dismissed for want of conversion of the equivalent value into Malaysian Ringgit before filing.

In this case the bankruptcy notice stated not only the original sum due in US Dollars, but also stated clearly the conversion rate applied, being RM3.62 = US$1, substantially below the official rate of conversion of RM3.80 = US$1 of which public notice may be taken.

In the case of *Overseas Chinese Banking Corporation Ltd. v. Firm of Yaik Joo Ann* [1936] MLJ Rep 88 it was held that:

> when a statement of claim is endorsed upon a specifically endorsed writ in respect of an amount due upon a foreign judgment; the claim should be expressed in Straits Settlement Currency; and it should show the amount in Straits Settlement which is the equivalent of the amount of the foreign currency due on the foreign judgment, calculated as on the date when foreign judgment was obtained.

The judgment in this case was obtained on 21 June 1996. The above case would suggest that the exchange rate should be the rate on the date of judgment, being about two and a half ringgit. If a debtor refuses to pay, and an adverse exchange rate change occurs during the delay, I do not see the fairness or justice that the debtor should benefit from it. Such a practice would only encourage judgment debtors to delay settlement upon a judgment when they feel it would suit them, and force judgment creditors to take execution or execution type proceedings without being compensated from the foreign exchange loss. This issue upon the exchange rate to be applied is entirely distinguishable from those cases such as *Low Mun v. Chung Khiaw Bank Ltd* [1987] 2 CLJ 400; [1987] CLJ (Rep) 172 SC, that requires that the sum in the demand must be correct. There is no dispute in this case as to the sum in the original currency in the judgment.

Ability To Pay

It was argued, with reference to encl. 34 that a) the debtor has 300,000 share in judgment creditor's company, b) at p. 8 it was stated that profit for 1997 is RM3,829,298 and therefore the judgment debtor's share of the profit is more that the judgment debt (ie, RM500,000). It was argued then that it cannot be said that the debtor is unable to pay the judgment sum and the bankruptcy proceedings ought not to have been instituted and ought to be set aside.

The submission ignores the fundamental fact that the company and the debtor are entirely separate entities such that the profits of the company are not necessarily the profits in the hands of a shareholder in proportion to his shareholding. Dividends must first be declared. Until the dividends are in his hands, and in the absence of any evidence as to any other assets that may be used to make payment, the debtor was clearly a person who is unable to pay. In any case the submission on ability to pay contains no merit in view of s. 3(1)(i) of the Bankruptcy Act 1967 (Revised 1988) which provides:

(i) if a creditor has obtained a final judgment or final order against him for any amount and execution thereon not having been stayed has served on him in the Federation, or by leave of the court elsewhere, a bankruptcy notice under this Act requiring him to pay the judgment debt or sum ordered to be paid in accordance with the terms of the judgment or order, with interest quantified up to the date of issue of the bankruptcy notice, or to secure or compound for it to the satisfaction of the creditor or the court; and he does not within seven days after service of the notice in case the service is effected in Malaysia, and in case the service is effected elsewhere then within the time limited in that behalf by the order giving leave to effect the service, either comply with the requirements of the notice or satisfy the court that he has a counter-claim, set off or cross demand which equals or exceeds the amount of the judgment debt or sum ordered to be paid and which he could not set up in the action in which the judgment was obtained or in the proceedings in which the order was obtained:

Provided that for the purposes of this paragraph and of s. 5 any person who is for the time being entitled to enforce a final judgment or final order shall be deemed to be a creditor who has obtained a final judgment or final order;

Until the judgment order has been stayed, the judgment creditor is entitled to proceed with execution. It is trite law that an appeal does not operate as a stay of execution.

Affidavit Verifying Petition (encl. 25) Is Premature

It was argued since the creditor's petition as at encl. 25 was filed on 23 September 1998 and the affidavit verifying petition (encl. 26) was filed on 22 September 1998 ie, before petition and since rr. 106, 108 shows a petition not filed in court cannot be affirmed, the affirmation filed on 22 September 1998 was defective. *Ban Hin Lee Bank Bhd v. Pang Lai Hin* [1999] 4 CLJ Supp 385 HC was cited in support. That case dealt with an affidavit in support of an originating summons, which comes into existence upon filing. Petitions on the other hand come into being upon execution by the petitioner, and not upon filing. The creditor's petition in this case was executed on 22 September 1998, being the same day that the affidavit verifying the petition was filed. The submission is there not sustainable in law.

Conclusion

The grounds pursued by the appellant as above failed to address satisfactorily the fact that a judgment had been obtained by the respondent against the appellant in Guaman D1-22-1066-1994. There was no appeal by the appellant in that case, and more particularly, no stay of execution was applied for and obtained by the appellant in that case. That being so, the respondent as the successful litigant, is ordinarily entitled to obtain satisfaction on that judgment.

This bankruptcy notice is an entirely separate action from the suit upon which judgment was obtained. Now, s. 3 of the Bankruptcy Act defined the various acts of bankruptcy as would sustain the issue of a bankruptcy notice may be issued. Since it is not the policy of the law that a person should be made a bankrupt when he has a counter-claim, set off or cross demand, *Re Chew Chee Sun, ex p Chan Theam Soon* [2000] 4 CLJ 144, s. 3(1)(i) provides that an act of bankruptcy occurs if a creditor has obtained a final judgment or final order against him for any amount and execution thereon not having been stayed, has served upon him a bankruptcy notice, and the debtor fails to satisfy the court that he has a counter-claim, set off or cross demand which equals or exceeds the amount of the judgment debt or sum ordered to be paid and which he could not set up in the action in which the judgment was obtained or in the proceedings in which the order was obtained. In other words if the debtor satisfies the court that he has a counter-claim, set off or cross demand which equals or exceeds the amount of the judgment debt or sum ordered to be paid, the bankruptcy notice would be set aside.

What was filed was an affidavit in opposition (encl. 4) which was filed on 27 May 1998 but served upon the respondent on 3 July 1998, which left the amounts unquantified, providing no basis upon which the court can be satisfied that the appellant has a counter-claim, set off or cross demand which equals or exceeds the amount of the judgment debt. Reference was made to an undertaking for damages in respect of an injunction that was obtained by the respondent. However, the affidavit in opposition to the bankruptcy notice did not depose to any circumstances that would provide a basis to believe there would be substantial damages as would equal or exceed the amount of the judgment debt. It is impossible on the basis of the affidavit in opposition to quantify the appellant's counter-claim, set off or cross demand (see *Perwira Habib Bank Malaysia Bhd v. Samuel Pakianathan Jabamanickam* [1993] 3 CLJ 349 SC; *Ratna Ammal v. Tan Chow Soo* [1971] 1 MLJ 277 FC). Simple assertions are insufficient. In *Perwira Habib Bank Malaysia Bhd. v. Samuel Pakianathan Jabamanickam* Mohamed Azmi SCJ held:

> The burden of proof is on the respondent to show by the affidavit that the counterclaim must be capable of being quantified in terms of money and the affidavit must quantify it.

The respondent subsequently filed on 23 September 1998 a creditor's petition (encl. 25) supported by an affidavit verifying the statements in the petition (encl. 26) filed the next day for the issue of a receiving order and adjudication order as required by r. 106. The appellant filed a notice of intention to oppose the petition on 2 December 1998 setting out briefly thirteen grounds (encl. 32). On the same day he applied (encl. 34) to set aside the order for substituted service made on 5 November 1998 and to stay all proceedings

against him. But the notice of intention is not supported by an application supported by an affidavit, and thus failed to follow r. 18. In *Development & Commercial Bank Berhad v. Datuk Ong Kian Seng* [1995] 3 CLJ 307 FC, Mohamed Dzaiddin Hj Abdullah FCJ, delivering the judgment of the Federal Court, followed *Datuk Lim Kheng Kim v. Malayan Banking Bhd* [1993] 4 BLJ 28 SC and held:

> Rule 117 provides that where a debtor intends to show cause against a petition, he shall file a notice specifying the statements in the petition which he intends to deny or dispute. The contents of the notice can be found in Form 16 of the rules wherein it must be stated that he intends to oppose the making of the receiving order as prayed and that he intends either to dispute the petitioning creditor's debt or the act of bankruptcy or as the case may be. Rule 18 of the Rules further provides that except where the rules or the Act provide, every application shall, unless the court otherwise directs, be made by motion supported by an affidavit. In Datuk Lim Kheng Kim, the Supreme Court held that failure to follow r. 18, which requires an application to be made by motion supported by affidavit, renders an affidavit in opposition ineffective and bad in law because unless the court otherwise directs, challenges to the creditor's petition or bankruptcy notice other than that the debtor has a counterclaim, set-off or cross demand which equals or exceeds the judgment debt, must be made by filing (314) a notice of motion supported by an affidavit. This Court has no reason to disagree with the decision and will follow it.

In as much as the affidavit in opposition such as encl. 4 cannot be treated as compliance with r. 18, so also an application such as encl. 34 to set aside the order for substituted service made on 5 November 98 and to stay all proceedings against him, cannot be treated as compliance with r. 18 for the purpose of opposing the creditor's petition.

The appeals are therefore dismissed with costs, and the decisions of the learned senior assistant registrar on 17 September 1998, 21 December 1998 and 18 September 1999 are confirmed.